SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

08/22/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000869

FILED: _____

STATE OF ARIZONA

DIANA C HINZ

v.

KATHERINE BRAUNER SEGAL

TAMARA D BROOKS-PRIMERA

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #6057744

Charge: 1. DUI/PHYSICAL CONTROL
2. DUI/.10 AND ABOVE
3. DUI/EXTREME

DOB: 09/16/66

DOC: 05/28/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

08/22/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2001-000869

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court, exhibits made of record and the Memoranda submitted by counsel.

Counsel for Appellant has filed a brief pursuant to ***Anders v. California***[1] and ***State v. Leon***[2]. Counsel has avowed that there are no arguable questions of law and has requested that this Court search the record for fundamental error pursuant to A.R.S. Section 13-4035. This Court had previously granted Appellant the opportunity to file a supplemental brief *pro se,* but none has been filed.

Appellant, Katherine Brauner Segal, was charged with three crimes: Count 1, Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); Count 2, Driving with a Blood Alcohol Content of .10 or Greater, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and Count 3, Driving with a Blood Alcohol Content of .18 or Greater (Extreme DUI), also a class 1 misdemeanor, in violation of A.R.S. Section 28-1382. These crimes were alleged to have occurred on May 28, 2001. Appellant has filed a timely Notice of Appeal in this case.

Though not raised by either party, Appellant was convicted of Counts 2 and 3 (Count 2 is Driving with a Blood Alcohol Content of .10 or Higher, and Count 3 is Extreme DUI) and it appears that these charges are multiplicitous. Appellant argued in the lower court that his conviction of Count 3, Extreme DUI, must be dismissed or vacated. These double jeopardy issues are questions of law which must be reviewed *de novo* by this Court.[3]

The double jeopardy clauses in the United States and Arizona Constitutions prohibit conviction for an offense and its

[1] 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).
[2] 104 Ariz. 297, 451 P.2d 878 (1969).
[3] *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000).

lesser included offense.[4] The crime of Driving with a Blood Alcohol Content Greater than .10 or more [A.R.S. Section 28-1381(A)(2)] is a lesser offense of Extreme DUI. The elements for each crime are identical with the exception that the crime of Extreme DUI requires an additional element of having a blood alcohol content greater than .18. The test for a lesser included offense was summarized by Judge Erlich in State v. Welch,[5] as:

> An offense is a lesser included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another way, the greater offense contains each element of the lesser offense plus one or more elements not found in the lesser (citations omitted).[6]

When two convictions are based on one act, and one is the lesser included offense of the other, the lesser conviction must be vacated.[7]

For the reason that the appropriate remedy appears to this Court to be to vacate the conviction of Count 2 [Driving with a Blood Alcohol Content Greater than .10, in violation of A.R.S. Section 28-1381(A)(2)], this Court need not address a multiple (double) punishment argument that might be made. Clearly, A.R.S. Section 13-116 is not violated when this Court vacates the conviction for Count 2.

This Court, therefore, concludes, as did the Court of Appeals in State v. Welch[8] that vacating the conviction of the

[4] Id.
[5] Id., 198 Ariz. at 556, 12 P.3d at 231.
[6] Id., citing *State v. Cisneroz*, 190 Ariz. 315, 317, 947 P.2d 889.891 (App.1997).
[7] Id.; State v. *Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App.1998); *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App.1995).
[8] Supra.

lesser included offense is the appropriate and correct remedy in this case.

This Court has found no other errors and has reviewed the record from the Phoenix City Court to make an independent determination that sufficient evidence was presented to sustain the judgments of guilt and sentences imposed on Counts 1 and 5. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[9] All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.[10] If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.[11] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[12] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[13] The Arizona Supreme Court has explained in *State v. Tison*[14] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an

[9] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v.Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).
[10] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[11] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[12] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[13] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[14] SUPRA.

> unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[15]

This Court finds that the trial court's determination as to guilt and sentences on Counts 1 and 3 was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED vacating Appellant's conviction for the crime in Count 2, Driving With A Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED affirming Appellant's convictions and sentences for Count 1 and 3.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

[15] Id. At 553, 633 P.2d at 362.